84-1747

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

CLEO F. SHOULTZ,

Petitioner,

vs.

MONFORT OF COLORADO, INC., a Delaware Corporation; KENNETH W. MONFORT, AND SAMUEL D. ADDOMS,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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56

QUESTION PRESENTED

Whether the right to petition for redress of grievances provided in the First Amendment provides absolute immunity to persons who have maliciously communicated false and defamatory statements about a federal meat inspector and participated in a conspiracy to have him removed from his assigned place of duty, prevent him from performing his duties at such place, or to molest, interrupt or hinder him in the discharge of his official duties within the meaning of 42 United States Code Section 1985(1)?

The parties are as named in the Caption.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, which has not yet been published, was announced on February 7, 1985. A verbatim copy is appended hereto as Appendix A.

On November 24, 1981, the United States District Court for the District of Colorado Ordered the Dismissal of Petitioner's (hereafter Mr. Shoultz) Amended Complaint. A transcript of the oral order is appended hereto as Appendix B. A formal Order pursuant thereto was entered by the District Court on February 8, 1982.

JURISDICTION

This Court has jurisdiction to entertain this Petition for Certiorari pursuant to the provisions of 28 United States Code Section 1254(1).

The District Court had jurisdiction of this case pursuant to the provisions of 28 United States Code Section 1331(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the interaction between the First Amendment to the Constitution of the United States and the statute codified as 42 United States Code Section 1985(1).

These are set forth in Appendix D.

STATEMENT OF THE CASE

A. Procedure

After Mr. Shoultz filed his Amended Complaint (attached hereto as Appendix C) the defendants, both federal (who are not named as respondents in this petition) and the non-federal (hereafter the Monfort Defendants) filed motions to dismiss the Amended Complaint for failure to state claims upon which relief could be granted. The United States District Court thereafter dismissed the Amended Complaint. Timely appeal was then taken to the United States Court of Appeals for the Tenth Circuit, which affirmed the Order of Dismissal on February 7, 1985.

This petition involves only the Monfort Defendants and only the Claim for Relief based upon 42 USC 1985(1) (hereafter the 1985 claim). In the light of the decision of this Court in *Bush v. Lucas,* _____ US _____, 51 USLW 4752 (1983), which was announced while the appeal was pending below, Mr. Shoultz does not seek review of that part of the decision denying him a right to procede against the federal officials named in his Amended Complaint.[1]

B. FACTS

Mr. Shoultz, was employed as a meat inspector by the United States Department of Agriculture ("USDA"), Food Safety and Quality Service ("FSQS"), Meat and Poultry Inspection Program ("MPI") (R. 17). Prior to October 4, 1977,

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[1]References to the pleadings in this case, which are contained in Volume I of the Record of Appeal, shall be in the form "R. _____." References to the transcripts of the hearings on The Motions to Dismiss, which transcripts are contained in Volume II and III of the Record of Appeal, shall be in the form "Vol. _____, p. _____."

he was assigned as a meat inspector to inspection duties at the Greeley, Colorado, meat processing and packing plant of Appellee Monfort of Colorado, Inc. (R. 17-18).

Mr. Shoultz alleged that he constantly and steadfastly required that Monfort of Colorado comply with federal meat inspection statutes and USDA rules and regulations (R. 19). During the time he was assigned to Monfort of Colorado's Greeley Plant, this company, and Kenneth W. Monfort and Samuel D. Addoms, the company's chairman of the board and president, respectively, knowingly and intentionally violated USDA inspection regulations concerning sanitation, rules and regulations governing transportation of edible and inedible products and governing the export of meat products, and further falsified documents in connection with these violations (R. 19-20).

The Monfort defendants in response and in retaliation to Mr. Shoultz' attempts to strictly enforce USDA rules and regulations, embarked on a program to harrass, persecute, and otherwise interfere with his activities as a federal meat inspector, and knowingly and maliciously sought to cause the USDA to discharge him from his employment or remove him from their plant. Specifically, Mr. Monfort telephoned Mr. Shoultz' superiors in Washington, D.C., demanding that he be removed from the Greeley plant and be reassigned to inspect another plant owned by another company. Mr. Addoms wrote a letter to Mr. Shoultz' more immediate supervisors in Colorado in an effort to get him out of the plant, as a result of which D. W. Anderson, the USDA Area Supervisor for MPI in Colorado (R. 18), and the other federal officials detailed Mr. Shoultz on October 4, 1977, to another USDA-inspected facility in Denver, (Tr. 21).

Mr. Shoultz was never allowed to return to meat inspection duties at the Monfort of Colorado plant in Greeley. When his supervisors sought to transfer him back to this plant, Monfort

of Colorado and Messrs. Monfort and Addoms informed USDA that they would prevent him from entering their plant under any circumstances by security personnel (Id.).

Mr. Shoultz' supervisors in the USDA took no action to require Monfort of Colorado and its officers from interferring with his inspection assignment to the Greeley plant. Instead, he was again temporarily "detailed" to Denver pending permanent reassignment and was then forced to elect to accept reassignment to one of the following locations: New York City; Chicago; Carthage, Texas; Alachua, Florida; and Glasgow, Kentucky (R. 23). Mr. Shoultz alleged that certain of his USDA supervisors, Robert Angelotti, the Administrator of FSQS, D. W. Anderson, Walter H. Huber, Assistant Area Supervisor, and after January 1978, the Acting Area Supervisor for MPI in Colorado, and Joseph Blair, an Executive Assistant for FSQS (R. 18-19, joined and participated with the Monfort Defendants in these decisions to provoke him to accept his removal from the Greeley plant (R. 22).

The Amended Complaint contained three claims for relief. Only the dismissal of the first, based on §1985(1), is the subject of this petition.

REASONS FOR GRANTING THE WRIT

There are two reasons why the writ should be granted in this case:

1. To protect the federal service from malicious interference for the reasons eloquently set forth by this court one hundred and forty years ago in *White v. Nicholls*, 44 US (3 How) 266 (1945).

2. To resolve a serious conflict between the circuits on the question of whether the right to petition for redress of grievances provides an absolute, rather than a qualified,

immunity against allegations that persons have maliciously interfered with federal officials in violation of Sec 1985(1).

These will be dealt with in that order.

1. Federal Officials who are properly performing their duties are entitled to the protection from malicious interference with those duties provided by Sec 1985(1).

This Court has held that while unintentional defamation of a governmental official in the course of a petition for redress of grievances would be protected by the First Amendment, intentional defamation by submission of false information about him would not be so protected. While this is an old case, it has never been overruled and indeed was cited in recent years by this Court in *Herbert v. Lando*, 441 US 153, 163, n. 10 (1979) to support the proposition that while publishers had a qualified immunity from liability for the libel of public figures, this immunity did not extend to a publication made with malice.

The thrust of Sec 1985(1) is the protection of the efficient operation of the federal government by protecting its officials in the proper performance of their duties from unfounded and unjustified attack. While this law was enacted by the Congress after the decision of this Court in *White v. Nicolls, supra*, it must be presumed that the Congress was aware of that decision and its interpretation of the qualified privilege provided by the First Amendment (*Cannon v. University of Chicago*, 441 US 677, 697-698 (1979). There is no indication in the language of Sec 1985(1) that the Congress intended to destroy the protection afforded to active federal officials by the decision of this Court in *White v. Nicolls, supra*, against a conspiracy designed to destroy their effective enforcement of other laws enacted by the Congress. Rather it was obviously designed to enhance such protection.

The importance and scope of the right to petition for redress of grievances has long been recognized by this Court. Nevertheless, this Court has held that such right may not be asserted to cover a sham designed to interfere with the business relationships of a competitor, and that where such a sham was shown, the First Amendment would not provide immunity from the antitrust laws (*California Motor Transport Co. v. Trucking Unlimited*, 404 US 508, 513-516 (1972).

Thus this Court has again held the First Amendment to provide only a qualified rather than an absolute immunity. This approach is in line with other decisions of this Court finding that constitutional immunities are qualified rather than absolute.

In applying a qualified immunity standard to high governmental officials, this Court has held that such good faith defense could be defeated by a showing of "*malicious intention* to a deprivation of constitutional rights or other injury...." (emphasis by the Court) (*Harlow v. Fitzgerald*, 457 US 800, 815, (1982) quoting with approval from *Wood v. Strickland*, 420 US 208, 322, (1985)).

> "The proof of 'actual malice' calls a defendant's state of mind into question ... and does not readily lend itself to summary disposition." (citations omitted).

(*Hutchinson v. Proxmire*, 443 US 111, 120, n. 9, (1979))

Hutchinson v. Proxmire went on to point out that the Speech and Debate Clause in the Constitution does not extend protection to members of Congress in "... attempts to influence conduct of executive agencies or libelous comments made during the conversations." (Id. at 443 US 121, n. 10).

See also *Procunier v. Navarette*, 434 US 555, 561-562 (1978) and *Scheuer v. Rhodes*, 416 US 232, 247-248 (1974).

Indeed, if every petition for redress of grievances were given the protection of absolute privilege, the tort of abuse of process would be unconstitutional. This Court however used the language of abuse of process to describe the kind of litigation activity that the First Amendment does not protect (*California Motor Transport Co. v. Trucking Unlimited, supra*, at 404 US 513)

The vice of the decision below is in its holding that:

> "The First Amendment right to petition for redress of grievances is implicated here as well. We are likewise 'not persuaded that Congress intended the language of Sec. 1985(1) to curtail this type of redress-seeking *under any circumstances*.' " (emphasis supplied)

(App A, Sec II of the Opinion, p. 19, infra).

Both the Court of Appeals and the District Court stated that Mr. Shoultz should have pursued a state remedy for tortious interference with his contract. What they failed to recognize is that their holding of absolute immunity under the First Amendment would equally be a defense to such a claim (see e.g. *Forro Precision, Inc. v. IBM*, 673 F2d 1045, 1065-1066 (9th Cir. 1982)). If, however, this Court were to hold that the First Amendment provided only a qualified immunity then there would be no barrier to Mr. Shoultz to proceed with his state claim or to the claim he brought here under Sec. 1985(1) (See: W. Prosser, Law of Torts, Sec 16 at 98-99 (4th ed 1971)).

In a recent case, a federal court held that the doctrine of *White v. Nicolls, supra*, made a qualified privilege applicable to a common law claim against the defendant, and that a finding of malice would defeat the First Amendment privilege defense, but then held that the First Amendment privilege was an absolute barrier to plaintiff's claim under 42 U.S.C. 1985 (*Smith v. McDonald*, 562 F Supp 829, 839-840 (MD NC 1983)). Even if

this Court were to accept such an incongruous dichotomy, based as it was upon a very grudging acceptance of the application of the first eight amendments to the states, the decision below foreclosed Mr. Schoultz' common law remedy.

The decision below would perforce bar Mr. Shoultz' claim in the Courts of Colorado on a tortious interference count. Under the Supremacy Doctrine they would be required to follow the Federal law and the holding below that the Monfort defendants had an absolute privilege under the First Amendment.

Even pretermitting the Supremacy Doctrine, Mr. Shoultz would be faced with another impenetrable obstacle which would foreclose his common law remedy. The Colorado courts follow the doctrine of "issue prelusion" by collateral estoppel (*Pomeroy v. Waitkus*, 517 P2d 296, 299 (Colo. 1973)). Under Colorado law, "privilege" is a defense in a tortious interference case (*Howard v. Chrysler Corporation*, 705 F2d 1285, 1287 (10th Cir. 1983)). Were Mr. Shoultz to initiate an action in the state courts of Colorado, with the decision below still standing, he would be subject to a motion for summary judgment, which would have a very high percentage of being granted, on the basis of collateral estoppel. The issue of absolute privilege would have been decided against him in favor of the Monfort defendants.

The decisions below, inviting him to pursue his state remedies, have presented him with but a chimera, since those same decisions have foreclosed his pursuit thereof. Mr. Shoultz would be left with the dubious privilege of subjecting himself to payment of his opponents' attorneys fees and costs for having brought a frivolous or groundless law suit (see e.g. *Moore v. DeBruine*, 631 P2d 1194 (Colo. App. 1981)).

In any event this Court has held that the existence of a state remedy is not a bar to federal action in proper cases (*McNeese v. Board of Education*, 373 US 668, 672 (1964); *Monroe v. Pape*, 365 US 167, 183 (1961)).

The United States has at least as much interest in the supervision of the meat packing industry for the protection of the public health as it does in the regulation of the securities markets for the protection of the financial health of the public. The action of Mr. Shoultz was brought to protect his employment as a federal meat inspector against those who had tortiously interfered with the performance of his duties. The fact that the law pertaining to tortious interference with contract could be applied does not change the character of the interest of the federal government, nor to deprive the federal judiciary of the power and duty to provide effective relief in order to further the federal purposes behind the statutes pertaining to the regulation of the meat packing industry (CF. *J.I. Case Company v. Borak*, 377 US 426, 433-435 (1964)).

In the words of this Court:

> "First Amendment rights may not be used as the means or pretext for achieving 'substantive evils' ... which the legislature has the power to control."

(*California Motor Transport Co. v. Trucking Unlimited, supra*, at 404 US 515, quoting from *NAACP v. Button*, 371 US 415, 444 (1963). See also: *Otter Tail Power Co. v. United States*, 410, US 366 (1973), on remand, 360 F Supp 451 (D. Minn. 1973), affirmed 417 US 901 (1974)).

2. The Writ should be granted to resolve the serious conflicts between the Circuits on the scope and extent of immunity granted by the First Amendment right to petition for redress of grievances against a claim for relief brought by federal officials.

As shown above, the decision below puts the Tenth Circuit in the forefront of holding absolute immunity for the Monfort Defendants based upon their right to petition for the redress of grievances. In so holding, it purported to follow the Seventh

Circuit and also cited a decision of the Sixth Circuit in alleged support of its position.

Actually, in stating that it was following the decision of the Seventh Circuit that complaints about federal employees are protected under "any circumstances" from a Sec. 1985(1) claim, it overlooked the holding of that Court that:

> "A scurrilous anonymous letter *or an attempt to marshall political clout* to ruin an offending agent would certainly present different cases than does this open straight forward petition lodged through what the parties agree to be the proper and established channels." (emphasis supplied)

(*Stern v. United States Gypsum, Inc.*, 547 F2d 1329, 1343 (7th Cir. 1977), cert. den 434 US 1329 (1977)).

It may well be that it was this tempering language in the decision in *Stern* which motivated the denial of certiorari by this Court. The sentence quoted above would appear to be more in line with the language of *White v. Nicolls, supra.* In any event at least one other federal district court has interpreted *Stern* as providing absolute immunity against a Sec. 1985(1) action. (*Smith v. McDonald, supra*, at 562 F Supp 839-840), despite the decision in *White v. Nicolls, supra.*

The Court below also cited, on the immunity issue, the case of *Bradley v. Computer Sciences Corporation*, 643 F2d 1029, 1033 (4th Cir. 1981), cert. den 454 US 940 (1981)). The Court in *Bradley*, however, held only that there was a "qualified privilege" and did not discuss the issue of "malice" at all.

At least two other Circuits, the Sixth and the Ninth (in a Sec. 1985(3) case) have held that the First Amendment right to petition for redress of grievances does not grant absolute immunity.

> "We disagree, however, with the notion that a private person who conspires deliberately to defame a federal official in order to discredit that official in the eyes of his superiors is protected by the first amendment right to petition for redress of grievances... We therefore hold that the first amendment right to petition for redress of grievances does not protect from Section 1985(1) liability those who conspire intentionally to defame a federal officer in order to effect that official's discharge. To the extent that Stern holds to the contrary, we decline to follow it."

(*Windsor v. The Tennessean*, 719 F2d 155, 162 (6th Cir. 1983). The Court applied to 1985(1) actions the tests of *New York Times Co. v. Sullivan*, 376 US 254 (1964) (Id).)

In an action brought under Sec 1985(3) which involved a claim that the defendants had tortiously interfered with a project by abusing administrative and judicial proceedings, when faced with a claim of absolute immunity, the Court held that "... motivation, and therefore the merits of plaintiff's suit, is a factual matter not resolvable on the pleadings." (*Mayer v. Wedgewood Neighborhood Coalition*, 707 F2d 1020, 1023 (9th Cir. 1983)).

In the light of these conflicts, particularly between the decision below and that of the Sixth Circuit, which cannot be reconciled by factual distinctions or minor differences of wording, and the tendency of at least two United States District Judges (including the one at the trial level in the case at bar) to interpret *Stern* as providing absolute immunity against a 1985(1) action, this Court should grant the writ for resolution of this important Constitutional question.

CONCLUSION

The need to maintain the integrity of the federal civil service and to provide its officials with the protection of Sec. 1985(1); and the need to resolve the conflicts between the Circuits on the issue of absolute as opposed to only qualified immunity under the petition for redress of grievances clause of the First Amendment against Sec. 1985(1) claims, both support the desireability of a grant of the Writ in the case at bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three true copies of the foregoing Petition for Writ of Certiorari were hand carried to the offices of the attorneys for the Monfort Defendants, addressed to:

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prior to the deposit of this Petition in the United States Mail addressed to the Clerk of this Court.

_____

Irvin M. Kent

APPENDIX A

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CLEO F. SHOULTZ,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
MONTFORT OF COLORADO, INC., a Delaware Corporation; KENNETH W.	)	No. 82-1293
	)	
MONTFORT, SAMUEL D. ADDOMS, D.W. ANDERSON, ROBERT ANGELOTTI, WALTER H. HUBER and JOSEPH BLAIR, individually and as officials of the U.S. DEPARTMENT OF AGRICULTURE	)	

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 81-W-9)

Barry D. Roseman, Denver, Colorado (Edward H. Sherman, Denver, Colorado, was also on the brief) for Plaintiff-Appellant

Bruce A. Menk, Hall & Evans, Denver, Colorado (Alan Epstein, Hall & Evans, Denver, Colorado and Gary B. Blum, Denver, Colorado, were also on the brief) for Defendants-Appellees Monfort of Colorado, Inc., and Kenneth W. Monfort and Samuel D. Addoms

Janice Chapman, Assistant United States Attorney, Denver, Colorado (Robert N. Miller, United States Attorney, Denver, Colorado, was also on the brief) for Defendants-Appellees Robert Angelloti, D. W. Anderson, Walter H. Huber and Joseph Blair

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Before HOLLOWAY, Chief Judge, and SETH and McKAY, Circuit Judges

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HOLLOWAY, Chief Judge

Plaintiff-appellant Cleo F. Shoultz timely appeals the dismissal of his action and amended complaint for failure to state a claim upon which relief may be granted. Plaintiff brought this action under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. §§ 1985 and 1986, and 21 U.S.C. § 675.[1] We affirm.

I

Plaintiff Shoultz was employed as a meat inspector by the United States Department of Agriculture (USDA) Food Safety and Quality Service, Meat and Poultry Inspection Program. Before October 4, 1977, he was assigned to inspection duties at the Greeley, Colorado, meat processing and packing plant of defendant Monfort of Colorado, Inc. (defendant company). Plaintiff alleged that he required compliance with the appropriate statutes, rules and regulations but that defendant company and its individual officers, Kenneth W. Monfort and Samuel D. Addoms, knowingly and intentionally violated USDA regulations and sought to have the USDA discharge him from his employment. Plaintiff alleged that, as a result of this action, the remaining defendants as officials of the USDA (federal defendants) ousted plaintiff from his position at the defendant company and transferred him to another jurisdiction. I R. 17-23.

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21 U.S.C. § 675 (1976) is a part of the Federal Meat Inspection Act, as amended. Section 675 provides:

> Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this chapter shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever, in the commission of any such acts, uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of his official duties under this chapter shall be punished as provided under sections 1111 and 1114 of Title 18.

The amended complaint contains three separate claims for relief. In his first claim, plaintiff alleged that the defendant company and defendants Monfort and Addoms conspired with each other and with the federal defendants to prevent plaintiff from holding his office under the United States or from discharging his duties and to induce plaintiff to leave Colorado and to injure him or his property on account of his lawful discharge of the duties of his office, all in violation of 42 U.S.C. § 1985(1). Plaintiff also alleged that the federal defendants, having knowledge that these acts were about to be committed, and having power to prevent or aid in preventing the commission of the same, neglected and refused to do so, all in violation of 42 U.S.C. § 1986.

In his second claim, plaintiff alleged that on or about May 25, 1977, he received a serious on-the-job injury at defendant company for which defendant company is liable. Plaintiff also alleged that he refused to sign a release to defendant company and as a result, the company and defendants Monfort and Addoms conspired with each other and with the federal defendants to induce and persuade plaintiff's employer to discharge him. In doing so, plaintiff alleged defendants conspired to deter plaintiff from initiating an action for recovery for the damages he suffered, all in violation of 42 U.S.C. § 1985(2). In his third claim, plaintiff alleged that the federal defendants violated his Fifth Amendment rights, and in particular, his right to initiate and prosecute a civil action for damages in any court of the United States. In each claim plaintiff alleged that the acts were done maliciously. I R. 23-27.

After a hearing on defendents' motions, the district court dismissed the amended complaint. I R. 32. In dismissing as to the federal defendants the court stated that "[a]s to the implied remedy under the Meat Inspection Act, the remedy if any is criminal and I find no intent on the part of Congress to imply a tort remedy." III R. 30. The court stated that as to the constitutional tort theory, "the constitutional tort is a tort

having to do with principles of constitutional law." *Id.* "It does not have to do with ... employer-employee relationships." *Id.* "I don't think that the courts have gone so far as to say they're going to extend the statutes to create implied abilities to get into the federal courts." *Id.* "But, more importantly, federal employees have employment rights ... greater than the rights of anyone else." *Id.* at 31. He also stated that he didn't think it was possible to state a claim for relief against the federal defendants for exercising authority under what he "believe[d] to be their qualified immunity." *Id.*

The court also dismissed as to the non-federal defendants, stating that "a claim can be pleaded under state law for tortious interference with contract" and expressing doubt that there was diversity of citizenship, *id.* at 32-34, which we note was not averred in the amended complaint here. The judge relied on *Stern v. United States Gypsum Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 US. 975 (1977).

On appeal, plaintiff contends that he has stated a claim on which relief can be granted under 42 U.S.C. § 1985; that he has a valid claim under federal common law; that he has averred a claim on which relief can be granted under the constitutional tort doctrine; and that the federal defendants are not immune, as a matter of law, under the circumstances of this case.

II

We must, of course, follow the rule that

> a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted).

The well-pleaded material allegations of the complaint are liberally read and accepted for the purposes of this appeal as true. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965).

As to his 42 U.S.C. § 1985 claim against the non-federal defendants, plaintiff says that the ruling in *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977), relied on by the district judge, should not be applied here. *Stern* held that a § 1985(1) complaint is insufficient if it only alleges injury resulting from complaints about the plaintiff officer's official performance, lodged by the defendants with the officer's government superiors. The court reasoned that it should not lightly impute to Congress an intent to invade the right to petition the Government for redress of grievances, and that it was not persuaded that Congress intended § 1985(1) to curtail efforts for redress in these circumstances which involved complaints about IRS agents. Plaintiff says that while the right to petition for redress of grievances is important, this right must be balanced against the extremely strong public interest in the integrity of the meat inspection program and public confidence in this program; if meat packing companies are able to cause the removal of inspectors because of their vigorous enforcement of the law, these inspectors will think twice before performing their duties.

We agree with the district court that the *Stern* rationale should apply here. The alleged complaints by the non-federal defendants to the plaintiff's government superiors in the Department of Agriculture here are analogous to the complaints about the I.R.S. agent to his superiors in *Stern*. The First Amendment right to petition for a redress of grievances is implicated here as well. We are likewise "not persuaded that Congress intended the language of § 1985(1) to curtail this type of redress - seeking under any circumstances." *Stern*, 547 F.2d at 1345; *see also Bradley v. Computer Sciences Corp.*, 643 F.2d 1029, 1033 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981). Thus we

conclude that it was proper to dismiss as to the non-federal defendants the § 1985(1) claim alleging prevention of performance of duties by the plaintiff.

There are allegations in the second cause of action in the amended complaint of a claim under 42 U.S.C. § 1985(2) of obstructing justice and intimidating a party, witness or juror "in any court of the United States ..." This claim is based on allegedly negligent injury of plaintiff at the plant of defendant Monfort of Colorado, Inc., when a hind quarter of beef broke loose from a conveyor belt and injured plaintiff. In essence, plaintiff alleged that the non-federal defendants sought to procure a release and to persuade and induce plaintiff not to file an action for the injuries suffered, and that they conspired to deter, by force, intimidation or threat, plaintiff's initiating, prosecuting and testifying in an action for the damages he suffered.

We note, however, that the plaintiff did not allege that there was any basis for a diversity action against Monfort of Colorado, Inc., which could be prosecuted in a federal district court, or any federal question claim which might be maintained in the federal courts. Since § 1985(2) concerns only such acts of conspiracy, force, intimidation or threat against "any party or witness in any court of the United States," no viable claim under § 1985(2) is stated. This provision does not support a claim for such interference with a proceeding in a state court. Since allegations are not made here that the plaintiff was injured by obstruction of a federal court proceeding, a § 1985(2) claim of this sort was not stated. *See Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 1110 (1981).

III

As to his federal common law claim against the non-federal defendants, plaintiff says that while the Federal Meat Inspection Act, 21 U.S.C. §§ 601, *et seq.*, did not expressly provide a civil action for damages arising out of interference with his contract of employment and with performance of his duties as a federal meat inspector, such a remedy should be inferred from the statute and indeed must be inferred to avoid inconsistent results in similar situations and thus subject the rights and the duties of the United States to exceptional uncertainty, quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and citing 21 U.S.C. § 675. Plaintiff contends that the four-part test for implication of private remedies of *Cort v. Ash*, 422 U.S. 66 (1975) is met. Plaintiff also says that provision of a criminal penalty does not necessarily preclude implication of a private cause of action for damages.

As plaintiff contends, "provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages." *Cort v. Ash*, 422 U.S. 66, 79 (1975). The Court has reasoned that

> [i]n determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied) -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the

> plaintiff? See, *e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); cf. *J. I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment).

Id. at 78.

The Court has since "plainly stated that our focus must be on the intent of Congress.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 377 (1982); *see Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). The ascertainment of this intent involves examination of the original statute, and also study of any comprehensive reexamination and amendment of the statute and the contemporary legal context in which the statutory revision occurred, including whether an implied right of action was part of that context at the time of the revision of the statute. *Curran*, 456 U.S. at 381-82. *See also Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890, 894-95 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

First, we turn to the wording of the original 1907 Act. 34 Stat. 1260-65. We find nothing in the provisions of the 1907 Act from which a private right of action in favor of meat inspectors can be implied, nor does plaintiff cite any such provisions. His reliance is placed instead on 21 U.S.C. § 675, added in 1967 to the statute. *See* note 1, *supra*. Furthermore, we find no support in the wording of 21 U.S.C. § 675 for implication of a private right of action in plaintiff's favor. Although the section

provides criminal sanctions for assaulting, resisting and other interference with meat inspectors, no language in § 675 implies any damage remedy in favor of them. Plaintiff points also to the grant of jurisdiction to the district courts in § 674 "to enforce, and to prevent and restrain violations of, this chapter, and ... in all other kinds of cases arising under this chapter." Although these provisions are broad, they seem to be related to various enforcement proceedings.

In addition, while the 1907 Act underwent a comprehensive reexamination and amendment in 1967, an implied right of action was not part of the contemporary legal context in which the statutory revision occurred. We find no evidence that an implied right of action had been recognized in favor of meat inspectors by 1967, and plaintiff points to no such evidence.

The legislative history clearly indicates the intent of Congress in amending the "Federal Meat Inspection Act" in 1967. In connection with the 1967 amendments made by S. 2147, the Committee on Agriculture and Forestry stated:

> The committee feels that these and other provisions will assure consumers of wholesome and healthy meat products, and further, that livestock producers and conscientious meatpackers and operators will benefit by the elimination of the unscrupulous in the meat industry.

S. Rep. No. 799, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Ad. News 2188, 2191.[2] The House bill was passed in lieu of the Senate bill after substituting for its language much of the text of the Senate bill. *Id.* at 2188. It is apparent that the policy of the Federal Meat Inspection Act, as

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After consideration of all viewpoints, the Committee recommended the bill which it felt would

> (1) broaden the present meat inspection program by establishing a Federal-State cooperative arrangement under which the Federal Government would provide financial, technical, and scientific assistance to State agencies in order to improve the quality of State meat-inspection services. This financial aid could amount to as much as one-half the cost of a State program;
>
> (2) modernize and combine present statutes relating to meat inspection;
>
> (3) give the Secretary of Agriculture needed authority over wholesalers, truckers, warehousemen, brokers, renderers, and animal food manufacturers in order to control the traffic in unfit meat and meat products. This would provide additional insurance against the possibility of these products being sold to unsuspecting consumers for use as human food;
>
> (4) provide the Secretary of Agriculture with authority to immediately impose Federal standards on intrastate commerce at the request of a Governor; and
>
> (5) provide, in any event, that the Secretary of Agriculture may impose Federal standards on any intrastate plant if he determines that the plant is producing adulterated meat or meat food products for distribution which would clearly endanger the public health. Under this provision the Secretary would notify the Governor of the State of the transgression and would take affirmative action only if the Governor failed to do so.

S. Rep. No. 799, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. Code Cong. & Ad. News 2188, 2190-91.

amended by the Wholesome Meat Act of 1967, as stated in 21 U.S.C. § 602 (1970) "is above all to protect the health and welfare of consumers." *G. A. Portello & Co., Inc. v. Butz*, 345 F.Supp. 1204, 1208 (D. D.C. 1972). Because the plaintiff is not bringing this action as a consumer, or as a livestock producer or meatpacker or operator, but as a federal meat inspector, we cannot say that plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Cort v. Ash*, 422 U.S. at 78.

Nor are we persuaded that the implication of a private action in favor of meat inspectors themselves would effectively aid the primary congressional goals. *See id.* And lastly, we feel it appropriate in this instance that persons in plaintiff's circumstances be relegated to remedies created by state law. *See id.* at 78.

In sum, we cannot agree that the federal courts should imply a private remedy in favor of meat inspectors in these circumstances. *See Pacific Trading Co. v. Wilson & Co., Inc.*, 547 F.2d 367, 370-71 (7th Cir. 1976); *Mario's Butcher Shop & Food Center, Inc. v. Armour & Co.*, 574 F. Supp. 653, 654 (N. D. Ill. 1983).

IV

With respect to his claim based on the constitutional tort theory of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), plaintiff says that if a federal employee's supervisors take actions calculated and intended to impair, impede, and prevent the employee from exercising his constitutionally protected right to sue a third party for damages, then that interference with constitutional rights is itself actionable. Plaintiff argues that the intentional tort provision in the Federal Tort Claims Act does not preclude the assertion of a *Bivens* claim in cases arising under the statute

as well. Plaintiff also says that the Federal Tort Claims Act remedy is not as effective as the *Bivens* remedy.[3]

In *Bush v. Lucas*, 462 U.S. 367, 51 U.S.L.W. 4752 (1983), an aerospace engineer employed at the George C. Marshall Space Flight Center was demoted by the Director of the Center for making a number of public statements to the news media highly critical of the Center, and allegedly false and misleading. While his administrative appeal from the demotion was pending, the engineer filed an action against the Director in an Alabama state court seeking to recover damages for violation of his First Amendment rights, and the Director removed the action to the federal court. In rejecting the engineer's claim the Supreme Court noted that the cases most relevant to the problem before them were "those in which the Court has held that the Constitution itself supports a private cause of action for damages against a federal official. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)." *Id.* at 4754-55. Referring to *Carlson*, 446 U.S. at 18-19, the Court stated that a *Bivens* action could be defeated in two situations: first, where the Court could discern special factors counselling hesitation in the absence of affirmative action by Congress; and second, where there was a congressional determination foreclosing the damages claim and making the Federal Tort Claims Act exclusive. *Id.* at 4755.

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The amended complaint alleged in various places that the "individual official defendants" sought to persuade plaintiff to leave the Greeley plant where he was stationed, that they combined and agreed with the other individual defendants "to oust Plaintiff from his position and office at" Monfort of Colorado, "and eventually to discharge him or injure him and have agreed to remove him" and "to deprive him of the conditions of his employment," and that the "individual official defendants" by the actions described deprived plaintiff of rights granted by the Fifth Amendment and in particular of the right to initiate and present a civil action for damages in any court of the United States. I R. 26-27.

The Court then considered whether there were "reasons for allowing Congress to prescribe the scope of relief that is made available to federal employees whose First Amendment rights have been violated by their supervisors." *Id.* at 4756. The Court noted that

> [f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures - administrative and judicial - by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system.

(footnote omitted). *Id.* at 4757-58. The Court stated that

> if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases. In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service.

Id. at 4758. The Court, as in *United States v. Standard Oil Co. of California*, 332 U.S. 301, 302 (1947), declined "to create a new substantive legal liability without legislative aid and as at the common law" because it was convinced that "Congress is in a better position to decide whether or not the public interest would be served by creating it." *Bush*, 51 U.S.L.W. at 4759.

Here plaintiff is also attempting to bring a private cause of action for damages against federal officials for allegedly violating his Fifth Amendment rights and, in particular, his right to initiate and prosecute a civil action for damages. Because plaintiff's claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States,[4] we can not supplement that regulatory scheme with a new, nonstatutory damages remedy. *Id.* at 4759; *Vest v. United States Department of the Interior*, 729 F.2d 1284 (10th Cir. 1984). Accordingly, we hold that plaintiff does not state a claim on which relief can be granted based upon the constitutional tort theory establilshed by *Bivens*.

V

There remains plaintiff's claim asserted under 42 U.S.C. § 1986 against the "individual official defendants," ¶ 18 of the Amendment Complaint, I R. 24, for allegedly neglecting and refusing to prevent wrongs which the non-federal defendants had conspired to commit in violation of 42 U.S.C. § 1985. However, since we have held that no viable claim is stated under § 1985, the plaintiff has no valid claim premised on § 1986. *Santistevan v. Loveridge*, 732 F.2d 116, 118 (10th Cir. 1984).

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It does not appear that plaintiff's position, meat inspector in the USDA's Food Safety & Quality Service, Meat & Poultry Inspection Program, is specifically excepted from the competitive service. *See* 5 U.S.C. § 2102 (1976). Therefore, plaintiff is protected by the same elaborate, comprehensive scheme, relied on by the Supreme Court in *Bush*, by which improper actions of supervisors, such as removal, may be redressed. *See* 5 U.S.C. 7501 (1976), 5 C.F.R. § 752.201-§ 752-203 (1977).

VI

In conclusion, we are not persuaded by any of plaintiff's contentions that the dismissal of the action by the district court was in error. Accordingly, the judgment is

A F F I R M E D.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 81-W-9

CLEO F. SHOULTS,	)	*REPORTER'S TRANSCRIPT*
	)	
Plaintiff	)	*OF*
	)	
v.	)	*HEARING ON MOTIONS*
	)	
MONFORT OF COLORADO	)	*TO DISMISS*
et al.,	)	*Monday, November 24, 1981*
	)	
Defendants.	)	

Proceedings before the HONORABLE FRED M. WINNER, Chief Judge, United States District Court for the District of Colorado, commencing at or about 9:00 a.m., Tuesday, November 24, 1981, in Courtroom C502, United States Courthouse, Denver, Colorado.

* * * * *

THE COURT: All right, all Motions to Dismiss are granted, but they're granted on different bases and I want to make my ruling rather clear -- at least, I want to try to make my ruling clear, I may not make it clear.

I rule upon the Motions to Dismiss of the private defendants on grounds different from the basis of my ruling on the federal defendants. I appreciate the vigor with which the plaintiff has argued the implied remedy under the Meat Inspection Act. I appreciate the vigor with which the plaintiff has argued the constitutional tort theory. I reject both, and I do it for these reasons:

(1) As to the implied remedy under the Meat Inspection Act, the remedy if any is criminal and I find no intent on the part of Congress to imply a tort remedy.

As to the constitutional tort theory which, to the best of my knowledge, originated with *Bivens v. Six Unnamed Narcotic Agents*, and has gone down through and is -- I think, at least among more recent cases, is *Economou*, the constitutional tort is a tort having to do with principles of constitutional law. It does not have to do with assault and battery. It does not have to do with simple negligence. It does not have to do with, to the best of my knowledge, employer-employee relationships. Constitutional tort theory, by and large, has to do with illegal search and seizure, for example, or with a failure to afford due process, for example, matters covered by the Constitution of the United States.

I don't think that the courts have gone so far as to say they're going to extend the statutes to create implied abilities to get into the federal courts. I surely hope that isn't the law or we are going to be so busy around here, we won't know what we are going to do.

But, more importantly, federal employees have employment rights -- except when they get furloughed -- greater than the rights of anyone else. I learned to my surprise under *Chandler v. Rodabush* that a federal employee gets a trial de nova in a Title 7 case where just an ordinary employee does not. Federal employees have rights and rights and rights and rights and rights and rights that most people don't have, and to say they can just sue their bosses instead of following the statutory scheme that has been created for federal employees to give them all of these rights is something I just cannot go along with.

I dismiss as to the federal defendants on these grounds, and as to these defendants I dismiss with the comment that I don't think it's possible to state a claim for relief against these

defendants for exercising what I believe to be is their qualified immunity -- for acting under what I believe to be their qualified immunity. I recognize that *Barr v. Mateo* may not be totally the law anymore, but it's still partially the law and where a federal employee acting in a supervisory capacity brings about the discharge of a federal employee acting in an inferior capacity, I do not think that either the federal law or the state law recognizes a claim in the nature of interference with contract --tortious interference with contract. The employee's rights are within the administrative channels of the federal government, which go on forever and ever and ever and ever. That being so, I do not believe that you can plead a claim against the federal defendants here.

Now as to the non-federal defendants, I think a claim can be pleaded under state law for tortious interference with contract, but I cannot accept the concept that you can bring the state -- the Colorado citizens individuals into the federal court to try out a claim which I think, as best, is tortious interference with a contract. I think that the United States Supreme Court has made clear that the civil rights statutes are not to be distorted to let every lawsuit get into the federal court and to create a whole new body of federal tort law which would let every automobile accident case, and everything else, into this court.

The claim that this -- and, actually, I should mention that the Complaint pleads and pleads only that this is brought under 1985(2) and apparently that is some sort of a theory to prevent the plaintiff from testifying in a state lawsuit. I don't know what that theory is -- but all of the discussion that we've had here today has to do with 1985(1) and I'm not going to be hypertechnical and consider the case only under 1985(2), I'm going to rule on it on the bases that it's brought under 1985 without specification of (1), (2) or (3). It's brought under all of them.

I am surprised at the lack or at the scarcity, I should say, of authority on this point but -- and the only case that has been called to my attention or that we have found that bears directly on it is *Stern v. United States Gypsum*, 543 F.2d 1329. As counsel has ably argued, that is a two-to-one opinion. I frankly don't know if cert. was asked for or not, I never did check it. But be that as it may, I totally agree with Judge Pell's opinion. To me, one of the most important aspects of our way of life is the right of the citizens to complain about conduct of a federal employee which the citizen believes to be improper. A great many complaints are made against federal employees which are totally unjustified and unjustifiable. Most citizens feel that any time they speak to a federal employee, the federal employee is automatically wrong, and I certainly don't subscribe to that theory.

But I do subscribe to the theory that every citizen has and must have a lawful right to complain against the conduct of a federal employee as long as the complaint is non-violent and as long as the federal employee is given the protection of all of the administrative procedures which must be followed through to bring about the discharge of a federal employee.

To go beyond that, I think is to destroy our way of life in this country and just as federal employees get more leave time than most private employees do, they pick up more headaches in some areas than private employees do. Nobody forced them to take the job. I don't know -- except for the military, I don't know of anybody who was ever forced to work for the federal government, and when they elect to go to work for the federal government, they elect to accept criticism from citizens with whom they deal who are disgruntled.

The federal employee, though, does not forfeit the right to bring state recognized tort actions, but unless there is diversity of citizenship, I don't think those tort actions can be brought in the federal court.

The action here, if any, should be one, in my judgment, in which it is claimed that there is a violation of the law of the State of Colorado and, although I don't know this for sure, I think that Monfort is a Colorado corporation, and I'm reasonably certain that the non-federal individuals are Colorado citizens.

Plaintiff has posed a question for Mr. Brumbaugh as to whether he would or would not remove if named again. I don't know, he can't answer that, he doesn't know, but I tried to make a ruling here which is one going to the substantive right to sue the federal officials, and unless plaintiff asks for leave to amend as to the federal officials and if plaintiff wishes to make further amendments in the Complaint as to federal officials, I will dismiss the Complaint and the action -- which action, as I understand it, means that as to the federal officials there is a judgment of dismissal of the action which is subject to appeal.

As to the individuals, I will dismiss the Complaint, which means a further Complaint can be filed if you want to. On the other hand, in dismissing the Complaint and later the action as to the individuals, I emphasize that I think a claim for relief can probably be pleaded but it, in my judgment, will have to be pleaded under state law. By saying this, I do not wish to be understood that I am making any ruling which should be considered by any state judge at a later date as being binding on the state court as to the sufficiency of a pleading under state law. I am not. I am just simply saying I don't think there is a claim under federal law which can be pleaded against any of the defendants in this case, but in dismissing as to the -- as to the Monfort and the non-federal defendants, I am not making any ruling that a claim cannot be stated against them nor am I making any ruling that a claim can be stated against them under state law. That is a matter which our very able state courts should pass upon.

Now I'll ask, do you want time to file another Complaint, or do you just want to go from here?

MR. SHERMAN: I think I'd like to ask time--

THE COURT: Sure.

MR. SHERMAN: --to file another Complaint unless we decide to amend.

THE COURT: Of course you may have any reasonable amount of time. Now I would like to especially ask counsel for the private defendants, I would like to try to get in some sort of a posture in this case that we wouldn't have to have a further hearing unless it's specifically requested. They would, I suspect, prefer not to come back unless they have to. So I would like to ask this, Mr. Sherman, within some reasonable time to be fixed by you, you advise me and opposing counsel by letter if you wish to file a Second Amended Complaint. Then if you do wish to file a Second Amended Complaint, you say in your letter whether you wish additional briefs and/or additional oral argument. How much time would you like for that letter?

MR. SHERMAN: Could we have 20 days, Your Honor?

THE COURT: Oh, sure. Just for the sake of our record keeping, let's fix an exact date. This is the 24th of November. That puts us mighty close to -- how about the 21st of December?

MR. SHERMAN: That's fine.

THE COURT: All right.

MR. SHERMAN: Did Your Honor say no claim could be filed against the officials in this court? I didn't understand that.

THE COURT: I can't say it can't be filed, I said in my judgment there is no such thing as a viable claim. I can't prohibit you from filing a telephone book, if you want to.

MR. SHERMAN: I see. You're not saying we can't file in the state court?

THE COURT: On the individuals, on the non-federal employees. I don't think there is a claim against the non-federal -- against the federal employees. I think they have a qualified immunity under *Barr v. Mateo*. I can't keep you from filing it.

MR. SHERMAN: I understand, Your Honor.

THE COURT: I can't keep you from filing it, I'm just saying I rule and I am ruling, as a matter of law, that a supervisory federal employee has a qualified immunity against his actions in discharging or participating in the discharge of an inferior federal employee because of all of the administrative protections set up within the civil service -- set up and, indeed, within the right to a trial de nova in this court.

Now, I'm not saying -- and under no circumstances should I be thought to say -- that if you make a viable claim against the federal government or the federal officials under the Civil Service Law, you've got a right to go through all the administrative red tape and all that and eventually wind up here on that.

MR. SHERMAN: I think I understand. Does Your Honor make this statement cognizant of the malice which is alleged in the Complaint?

THE COURT: Yes, I'm cognizant of it, but I just don't think it's adequately pleaded.

MR. ROSEMAN: Your Honor, again just to clarify. I guess, as I understand it, as to the non-federal defendants, the Court is dismissing not the Complaint and the action--

THE COURT: That's correct.

MR. ROSEMAN: --of 1985.

THE COURT: Well, I've got to dismiss the action, actually, because as long as the action is pending here, they can't refile. But I am under no circumstances to be understood to be dismissing or ruling that you don't have a claim for relief against the non-federal defendants in the state court.

MR. ROSEMAN: I understand.

THE COURT: But I'm not ruling that you do have.

MR. ROSEMAN: I understand.

THE COURT: I'm leaving that wide open for some very able state judge to decide. That's not for me to say.

MR. ROSEMAN: I'm just trying to clarify for appeal purposes.

THE COURT: All right, do you need any more help on clarification?

MR. ROSEMAN: No.

MR. SHERMAN: No.

THE COURT: Does the other side?

MR. MENK: I think I do. If the plaintiffs determine that they don't wish to file a Second Amended Complaint against the private defendants and so advise the Court and counsel--

THE COURT: Then the action will be dismissed against them. But in any future hearings before a state judge, I ask counsel to please explain to the state judge that I have made no ruling as to the merit or lack of merit of a state law claim pleaded in a state court action, that my ruling is limited to this court.

MR. MENK: I think, then, the question would be, when you're ruling with respect to the private defendants if it would be appealable, and I would suppose it would be at the point that the action were dismissed as opposed to now.

THE COURT: I believe it would be within 30 days after the dismissal of the action. As I understand it, no judgment is being entered today which is appealable. There is no appeal time which has started to run until the action itself is dismissed. There are two or three cases -- more than that -- out of the Tenth Circuit, the names which I don't recall, that hold a dismissal of a complaint as distinguished from a dismissal of an action is a non-appealable order, and that's what I'm trying to keep the plaintiff covered under.

MR. MENK: Okay.

THE COURT: All right, anything further?

(And these proceedings were concluded.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 81-W-9

CLEO F. SHOULTZ,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MONFORT OF COLORADO,	)	
INC., a Delaware Corporation,	)	AMENDED COMPLAINT
KENNETH W. MONFORT,	)	
SAMUEL D. ADDOMS. -	)	
D. W. ANDERSON, ROBERT	)	
ANGELOTTI, WALTER H.	)	
HUBER and JOSEPH BLAIR,	)	
individually and as officials of	)	
the U.S. Dept. of Agriculture,	)	
	)	
Defendants.	)	

COMES NOW the Plaintiff by his attorneys and for an amended complaint against the Defendants, and each of them, and for a first cause of action, states and alleges as follows:

This action arises under the following acts: Title 28 U.S.C., Section 1331; 28 U.S.C., Section 1343; 42 U.S.C., Sections 1985 and 1986; and 21 U.S.C., Section 675. The matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs and arises under the Constitution and Laws of the United States.

FIRST CAUSE OF ACTION

1. That at all times hereinafter mentioned Plaintiff, Cleo F. Shoultz, was employed as a meat inspector by the United States Department of Agriculture ("USDA") Food Safety and Quality Service ("FSQS"), Meat and Poultry Inspection Program ("MPI"). That Plaintiff was selected on the basis of aptitude and intelligence and was given extensive training in his employment as a meat inspector. That as such inspector he was to be assigned to plants and businesses dealing with meat and meat food products for the purpose of inspecting them, their operations and their conformity with rules and regulations as provided by the aforesaid services of the U.S. Department of Agriculture and the Federal Meat Inspection Act.

2. That prior to October 4, 1977, Plaintiff was assigned to inspection duties at the meat processing and packing plant in Greeley, Colorado, which was owned and operated by the Defendant, Monfort of Colorado, Inc. That as a consequence of this assignment Plaintiff moved his family to Fort Collins where he purchased a home and established a domicile for himself and his family.

3. Defendant Monfort of Colorado, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. At all times pertinent hereto, Defendant owned and operated a meat processing and packing plant located on North 8th Avenue, in Greeley, Colorado.

4. At all times pertinent hereto, Kenneth W. Monfort and Samuel D. Addoms were the chairmen of the board and the president, respectively, of Defendant and with respect to all matters covered by this Amended Complaint, were acting in such capacities and within the scope of the employment of Defendant and were active participants in the acts hereinafter mentioned.

5. That at all times hereinafter mentioned the Defendants, Robert Angelotti, D. W. Anderson, Walter H. Huber and Joseph Blair were officials of the United States Department of Agriculture (USDA) and were acting as hereinafter stated in their official capacities and in a supervisory capacity over the Plaintiff, Shoultz, and their individual roles and employment by the USDA were as follows:

a. Defendant Robert Angelotti was employed by USDA as Administrator of FSQS with general supervisory authority of MPI, including authority over the meat inspection programs conducted at the Monfort Plant.

b. Defendant D. W. Anderson was employed by USDA as Area Supervisor for MPI in Colorado, including the meat inspection program conducted at the Monfort Plant, until his retirement in January, 1978.

c. Defendant Walter H. Huber was employed by USDA as Assistant Area Supervisor and, after January, 1978, as Acting Area Supervisor for MPI in Colorado, including the meat inspection program conducted at the Monfort Plant.

d. Defendant Joseph Blair was engaged by the USDA-FSQS in a supervisory capacity as an Executive Assistant and exercised supervisory powers over the Plaintiff and did participate in the actions hereinafter described together with the others.

That all the aforesaid individual Defendants employed by the United States Department of Agriculture and exercising supervisory powers and control over the Plaintiff are hereinafter referred to individually by their last names and collectively as the "individual official defendants". That all of said Defendants together with the other Defendants were active participants in the actions hereinafter mentioned.

6. That in the exercise of his duties as a meat inspector, which duties required his inspection, examination and the passing upon of meat and meat food products which were dealt with at the various companies and transported in intrastate and in interstate or foreign commerce and which were governed by numerous health rules and regulations enacted for the benefit of the public, Plaintiff did constantly and steadfastly require of the employers of plant where he was assigned compliance with statutes of the United States and with the rules and regulations of the United States Department of Agriculture and its food services and he did perform his duties with utter and complete devotion to his job as an inspector.

7. That on numerous occasions during Plaintiff's assignment and presence within the plant of Monfort of Colorado, Inc., said Defendants did knowingly and intentionally violate and refuse to conform to the health standards required of said Defendant plant. Said Defendant company and its individual officers, Kenneth W. Monfort and Samuel D. Addoms did knowingly and intentionally violate USDA inspection regulations concerning sanitation, rules and regulations governing transportation of edible and inedible products, rules and regulations governing the exporting of products and they did falsify documents in support of the aforesaid violations and did violate and refuse to follow other rules and regulations and did object to the Plaintiff's reporting of matters of existing violations and other irregularities relating to rules and regulations which required certain standards of performance under the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the requirements of other standards imposed by statutes and the rules and regulations of the Department of Agriculture.

8. That during all of the times said Plaintiff was present as an inspector in the Defendant company's plant, he did strictly seek to enforce said rules and regulations and demanded compliance with the standards required by law, all for the health of those who would be consumers of the Defendant's products.

9. That as a proximate result of this Defendant company and the individual Defendants, Kenneth W. Monfort and Samuel D. Addoms, did maliciously and willfully, and with the intent to prevent Plaintiff from continuing his said employment or enjoying the benefits and conditions of his employment, did embark upon a program to harass, annoy, persecute, injure, destroy and otherwise interfere with Plaintiff's activities as inspector and the proper performance of his duties and the carrying-on of his said business, and they did wrongfully, fraudulently, intentionally and knowingly and maliciously seek in the Department of Agriculture and its services to discharge him from said employment or remove him from said plant.

10. As part of said design to injure Plaintiff and interfere with his employment they did vilify him in the eyes of his employer and its supervisors and agents, did disparage him, harass him and his family, did seek to injure him in his name and reputation and bring him into public scandal and disgrace before many others.

11. As part of said malicious design the Defendant Addoms mailed a letter to Plaintiff's area supervisor demanding Plaintiff's immediate removal as an inspector. Defendant Kenneth W. Monfort telephoned Plaintiff's supervisors in Washington, D.C., demanding the Plaintiff be removed from the Defendant's meat processing packaging plant in Greeley, Colorado, and be reassigned to a different location neither owned nor operated by Defendant and both of said individual Defendants and other agents and servants of the Defendant company did continue in their efforts to cause the removal and reassignment of plaintiff to other states far removed from his domicile; and as a consequence of said malicious acts, Plaintiff was detailed on or about October 4, 1977, to another Federally -inspected facility in Denver, neither owned or operated by Defendant. Thereafter when Plaintiff's supervisors sought to transfer Plaintiff to the Defendant's meat processing and packaging plant in Greeley, Colorado, said Defendants stated

that they would prevent Plaintiff from entering Defendant's plant under any circumstances by security personnel. Accordingly, Plaintiff was forbidden and prevented from returning to his prior assignment.

12. That all of the aforesaid actions of Defendants, and each of them, were willful and malicious and for the sole purpose of having Plaintiff discharged and removed or injured in retaliation for his strict and lawful performance of his duties as an inspector.

13. That plaintiff's employer has never prior to these unlawful acts of the Defendants complained concerning Plaintiff's work; and he has never been charged with neglect, dereliction of duty or incompetence in the performance of his duties.

14. In taking the actions described herein, Defendant intended to wrongfully and maliciously interfere, and did wrongfully and maliciously interfere with Plaintiff's contractual relationship of employment with USDA, to prevent Plaintiff from fulfilling his duties and to injure his reputation and damage his credibility with USDA and the FSQS and MPI programs administered by such Department.

15. That by reason of the unlawful and malicious acts of interference by the Defendants Monfort of Colorado, Inc., Kenneth W. Monfort and Samuel D. Addoms, and their urgings and solicitations upon the individual official Defendants abovenamed that they remove the Plaintiff from the plant in Greeley, or discharge him, said individual official Defendants as the officials of the Department of Agriculture did thereupon with malicious and unlawful intent proceed to oust Plaintiff from his position at the Greeley plant and to hinder him from carrying on his occupation and to transfer him to another jurisdiction upon the expectation that he would thereupon completely terminate his employment; and they did unlawfully

and recklessly succumb to the entreaties of the Defendants Monfort and Addoms who sought to rid themselves of Plaintiff because he exacted from them strict compliance with the law. Said individual official Defendants did join and participate with the other Defendants in intimidating and interferring with Plaintiff in his employment; and did further willfully, knowingly and maliciously refuse to protect Plaintiff and did ignore and violate provisions of the law and regulations enacted for the protection of an inspector from intimidation and interference in his job.

16. Whereupon on October 4, 1977, the Defendant Anderson and other individual official Defendants ordered Plaintiff transferred out of the Monfort plant and temporarily "detailed to Denver"; early in 1978 Defendants took administrative action against Plaintiff designed to impede the processing of Plaintiff's salary reports, injury reports, leave requests, and transfer and per diem vouchers for the purpose of discouraging or hindering Plaintiff's filing of a claim against Defendant Monfort of Colorado, Inc., and to provoke Plaintiff to accept his removal from the Monfort packing plant.

17. When said individual official Defendants could find no basis for transferring Plaintiff from said Monfort plant and transferred him back to the Monfort plant, they did then unlawfully cancel said reassignment back to the Monfort plant of the Plaintiff when they received a letter from the Defendant Addoms stating that "Plaintiff would be prevented from entering the Monfort plant under any circumstances by security personnel". Whereupon Plaintiff was then again temporarily "detailed" to Denver pending permanent reassignment and thereafter ousted from the Monfort plant and forced to elect to accept assignment in one of the following five locations: New York City; Chicago; Carthage, Texas; Alachua, Florida; and Glasgow, Kentucky. Accordingly said individual official Defendants and the other individual Defendants caused Plaintiff to be permanently assigned outside the State of

Colorado and to be otherwise discharged in order to rid the Defendant Monfort of Colorado, Inc. of Plaintiff's demands that said Defendant strictly comply with the law; and said official Defendants refused to protect Plaintiff from the burdens, inconveniences, and harassment which said Defendants subjected Plaintiff to because of his demands that they comply strictly with the law; additionally said acts of the Defendants were designed to make it more difficult for Plaintiff to file a claim and/or prosecute an action against Defendant Monfort of Colorado, Inc.

18. Defendants Monfort of Colorado, Inc., Kenneth W. Monfort and Samuel D. Addoms, by the actions described herein, forcibly resisted, opposed, impeded, intimidated and interfered with Plaintiff while he was engaged in or on account of the performance of his official duties under the Federal Meat Inspection Statute, 21 U.S.C. Sections 601 *et seq.*, all in violation of 21 U.S.C. Section 675. The said individual official Defendants willfully failed and refused to judicially or administratively enforce, restrain the violation of, or seek the imposition of penalties for the violation of 21 U.S.C. Section 675.

19. Defendants Monfort of Colorado, Inc., Kenneth W. Monfort, and Samuel D. Addoms, conspired with each other and with the said individual official Defendants to prevent, by force, intimidation or threat, Plaintiff from holding his office, trust, or place of confidence under the United States, or from discharging any duties thereof, and to induce by like means Plaintiff to leave the State of Colorado, district or place where his duties as an officer are required to be performed, and to injure him in his person or property on account of his lawful discharge of the duties of his office, all in violation of Plaintiff's rights under 42 U.S.C. Section 1985(2). The said individual official Defendants, having knowledge that the said wrongs conspired to be done, were about to be committed, and having power to prevent or aid in preventing the commission of the

same, neglected and refused to do so, all in violation of 42 U.S.C. Section 1986.

20. The scale of federal activities in the area of meat inspection is so vast that the desirability of a uniform rule for the protection of federal meat inspectors is plain. The Congressional purpose behind the federal meat inspection act, 21 U.S.C. Sections 601 *et seq.*, would be frustrated by the application of differing state standards for the protection of federal meat inspectors, and can be achieved only if a uniform federal law on this subject governs. Substantial rights and duties of the United States hinge on the determination of the legality of Defendants' actions and the liability of Defendants for their actions and the liability of Defendants for their actions or omissions against Plaintiff, as alleged herein."

21. The acts of said individual Defendants as described herein were done willfully, knowingly, and with malice and constitute a pattern of harassment, intimidation and undue influence and a willful, extreme and outrageous conduct and were attended by circumstances of fraud, malice, insult and reckless disregard for the rights and feelings of the Plaintiff, all to his damage of $250,000.00 and exemplary damages of $250,000.00.

SECOND CAUSE OF ACTION

For a second cause of action against the Defendants, and each of them, Plaintiff alleges as follows:

1. Incorporates herein by reference and makes a part of this cause of action each and all of the allegations set forth in the first cause of action.

2. That on or about May 25, 1977, while Plaintiff was employed as a meat inspector by the United States Department of Agriculture (USDA) Food Safety and Quality Service (FSQS)

and Meat and Poultry Inspection Program (MPI), and while in the performance of his duties therein, and while Plaintiff was walking through the Fabrication Department in said plant, when without warning or time to react, he was violently struck in his lower back and injured by a hindquarter of beef which had been placed on the conveyor system in said plant and had broken loose and was travelling at an excessive speed down said beef carcass conveyor system, wherein he was seriously injured. That said injuries were proximately caused by Defendant Monfort of Colorado, Inc. negligence and failure to exercise due care. That subsequent to said injuries the Defendants Monfort of Colorado, Inc., Kenneth W. Monfort, and Samuel D. Addoms sought to procure a release from Plaintiff for their negligence as aforesaid, and sought to pursuade and induce him not to file an action for damages for said injuries suffered.

3. That Plaintiff refused to sign said release or to exonerate said Defendants from their negligence and reckless disregard of his rights and indicated his intention to file an action for restitution for the damages he suffered.

4. That as a consequence of said refusal, the said Defendants, as a measure of reprisal and retaliation, and in addition to the malicious acts hereinabove mentioned which resulted from Plaintiffs lawful and faithful performance of his duties as an inspector, conspired with each other and with the said individual official Defendants to induce and persuade his employer to discharge him or remove him from his employment and the conditions thereof, and therefore injure and damage him in his business and future. In so doing, the Defendants conspired to deter, by force, intimidation, or threat, Plaintiff from initiating, prosecuting, and testifying in an action for restitution for the damages he suffered, all in violation of 42 U.S.C. Section 1985(2).

5. That said agreement of the Defendants was attended by circumstances of malice, insult and a reckless and willful

disregard for the rights and feelings of Plaintiff, justifying exemplary damages in the sum of $250,000.00.

THIRD CAUSE OF ACTION

For a third cause of action against the Defendants, and each of them, Plaintiff alleges as follows:

1. Incorporates herein by reference and makes part of this cause of action each and all of the allegations set forth in the first cause of action.

2. That the individual official Defendants, as officials of the Department of Agriculture of the United States have with malicious and unlawful intent combined and agreed with the other individual Defendants to oust Plaintiff from his position and office at Monfort of Colorado, Inc. and eventually to discharge him or injure him and have agreed to remove him after being unlawfully and maliciously solicited to oust him by the other individual Defendants, Monfort of Colorado, Inc., Kenneth W. Monfort and Samuel D. Addoms, and to otherwise hinder him from carrying on his occupation and to deprive him of the conditions of his employment and of exercising his rights and privileges as a citizen of the United States, and did otherwise damage him without justifiable cause or valid reason.

3. In pursuance of said unlawful design and combination said officials of the USDA, the individual official Defendants, did seek to persuade Plaintiff to leave the Greeley plant where he was stationed and did threaten him and did countermand a previous order that he be returned to the Greeley plant and did permanently assign him outside the State of Colorado, all to his great prejudice and disadvantage and did combine and agree with the other Defendants to maliciously interfere with his business and the condition of his employment to his great injure. That by reason of the premises Plaintiff has been damaged in the sum of $250,000.00.

4. The said individual official Defendants, by the actions described herein, deprived Plaintiff of rights guaranteed to him by the Fifth Amendment to the Constitution of the United States, and in particular of the right to initiate and prosecute a civil action for damages in any court of the United States.

5. That said agreement of the Defendants was attended by circumstances of malice, insult and a reckless and willful disregard for the rights and feelings of Plaintiff, justifying exemplary damages in the sum of $250,000.00.

WHEREFORE, Plaintiff prays that this court enter judgment in his favor and against the Defendants in the amount of $250,000.00 as and for compensatory damages, $250,000.00 as and punitive and exemplary damages, and further award Plaintiff interest, attorneys' fees and costs, and grant such other and additional relief as may to it seem proper.

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PLAINTIFF DEMANDS TRIAL BY JURY ON ALL ISSUES RAISED HEREIN

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 UNITED STATES CODE SEC 1985

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or

property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

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FILED
JUN 5 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1747

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

CLEO F. SHOULTZ,

Petitioner,

v.

MONFORT OF COLORADO, INC., A DELAWARE CORPORATION; KENNETH W. MONFORT, AND SAMUEL D. ADDOMS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a complaint concerning requests that a federal meat inspector be removed from his assignment, made by the owners of a meat processing plant to the superiors of a federal meat inspector, states a cause of action under 42 U.S.C. §1985(1) which can penetrate the freedom to petition for redress of grievances guaranteed by the First Amendment.

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INTRODUCTION

In reviewing Shoultz's Petition for Writ of Certiorari, it is important to understand what is *not* before the Court. First, plaintiff has not brought before the Court any question concerning liability under 42 U.S.C. §1985(1) for allegedly harmful actions, other than communications. Second, the communications at issue are not alleged to have been false or defamatory, nor, by their very nature, could they be.

Although plaintiff Shoultz alleges that the Monfort defendants engaged in a "program to harass, annoy, persecute, injure, destroy and otherwise interfere with plaintiff's activities as an inspector" (Complaint, paragraph 9), the only specific acts of the Monfort defendants of which plaintiff complains are the mailing of a letter and the placing of a telephone call to plaintiff's superiors, demanding plaintiff's removal or reassignment. (Complaint, paragraph 11; Petition for Writ Certiorari, Statement of Facts.) The Complaint focuses on these communications; the hearing on defendants' Motions to Dismiss dealt solely with these communications; the opinion of the Tenth Circuit Court of Appeals deals solely with these communications; the "Question Presented" and Statement of Facts in plaintiff's Petition for Writ of Certiorari focus on these communications; and the discussion supporting plaintiff's "Reasons for Granting the Writ" deals solely with communications. Thus, any question concerning other activities which may give rise to liability under 42 U.S.C. §1985(1) is not before the Court.

Second, and more importantly, plaintiff has not alleged, either in the Complaint or in the Statement of Facts in his Petition for Writ of Certiorari, that the communications complained of were false. Although plaintiff alleges that the acts of the defendants were "willful and malicious" and made "in retaliation for his strict and lawful performance of his duties as an inspector" (Complaint, paragraph 12), plaintiff never alleges that the statements communicated to his superiors were false. In fact, the communications complained of, two

demands for plaintiff's removal from defendant's plant (Complaint, paragraph 11), are not susceptible to being either true or false. They are merely requests, in the nature of petitions for the redress of grievances. As such, and contrary to the manner in which plaintiff phrases the "Question Presented", the communications at issue can be neither false nor defamatory.

REASONS FOR NOT GRANTING THE PETITION

Plaintiff has asserted two reasons for issuing the writ: (1) the need to protect federal meat inspectors in the proper performance of their duties; and (2) a perceived divergence between the Sixth and Seventh Circuits over the scope of immunity provided by the First Amendment's right to petition the government for redress of grievances. Neither is applicable to the facts of this case.

Enforcement of the Federal Meat Inspection Act Will Not Be Impeded.

The Federal Meat Inspection Act provides severe criminal penalties for its violation. 21 U.S.C. §§675, 676. Violators can be fined up to $10,000 and imprisoned for up to three years. 21 U.S.C. §676. Persons who impede, intimidate or interfere with a federal official enforcing the Meat Inspection Act may be fined up to $10,000 and imprisoned for up to ten years. 21 U.S.C. §675. Such severe sanctions are sufficient to deter violations of the Meat Inspection Act and interference with its enforcement. There is, therefore, no need to create a civil remedy under 42 U.S.C. §1985(1) to ensure compliance with the Meat Inspection Act or protection for those who enforce it.

Further, federal meat inspectors, as all federal employees, are protected from wrongful discharge by the extensive due process requirements of the Federal Civil Service System. (*See, e.g.*, 5 U.S.C. §§7503, 7513, 7701 and 7703.) The District Court for the District of Colorado and the Tenth Circuit Court of Appeals recognized this in the instant case,

as did the Seventh Circuit in *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied* 434 U.S. 978. The officials being so protected, there is no reason to fear that an immunity for citizen requests to remove a federal meat inspector from office would unduly hamper enforcement of the Federal Meat Inspection Act. As stated by the Seventh Circuit Court of Appeals in *Stern* v. *United States Gypsum, Inc., supra*:

> . . . we note that when charges of misconduct are made through official channels, as was the case here, the protective machinery of due process hearings is available, with full opportunity to refute that which is unfounded.

547 F.2d at 1344.

Moreover, there is no allegation here, either in the Complaint or in the Statement of Facts in the Petition for Writ Certiorari, that the requests communicated to plaintiff's superiors were unfounded. There being no such allegation, there is no reason to construe the opinion of the Tenth Circuit Court of Appeals in the instant case as providing an immunity for false or unfounded allegations. The decision only recognizes an immunity for statements motivated by malice or ill will, but which of themselves can be neither true nor false.

The presence or absence of malicious motivation must have no bearing on the immunity afforded those who petition their government for redress of grievances. Obviously, those citizens most aggrieved will be most likely to petition for redress. Those citizens may also harbor a malicious desire to retaliate against or injure the offending federal agent. Nonetheless, as stated by the Seventh Circuit Court of Appeals in *Sterns, supra*:

> The possibility that a citizen who feels himself to have been abused by a particular federal official may take satisfaction when the official gets his perceived

> due is too human for First Amendment protection to depend on its absence.

547 F.2d at 1343.

A Divergence Between Circuits Has Not Been Accentuated.

Plaintiff contends that the instant decision of the Tenth Circuit exacerbates a split between the Sixth and Seventh Circuit Courts of Appeal over the extent of immunity to be afforded complaints to superiors of federal officials by the First Amendment's right to petition for redress of grievances. A careful review of these decisions, however, reveals that the instant case does not exacerbate that split and would not be an appropriate vehicle to explore the proper scope of this immunity.

In *Stern* v. *United States Gypsum, Inc., supra*, plaintiff, an IRS auditing agent, alleged that defendants communicated false complaints to his superiors, resulting in his discharge. Defendants contended that the communication of their complaints was a "classic exercise" of their First Amendment right to petition the government for redress of grievances. The Seventh Circuit Court of Appeals agreed with the defendants that the presentation of complaints about an auditing IRS agent's professional conduct to his superiors is a "classic example" of the right to petition, 547 F.2d at 1343, and held that:

> . . . a section 1985(1) complaint is insufficient to state an actionable federal claim insofar as it only alleges injury resulting from complaints about the plaintiff officer's official performance lodged by the defendants with the officer's superiors.

547 F.2d at 1344.

Recognizing that plaintiff had alleged that the complaints were false, the Seventh Circuit nonetheless held the communications privileged. The fear of litigation and the difficulty of proving truth, the court observed, would otherwise "chill" the exercise of an aggrieved citizen's right to

petition through overly cautious self-censorship. 547 F.2d at 1345. The court thus balanced the individual's interest in freedom from job interference against the public's interest in the uninhibited exercise of First Amendment freedoms and found in favor of the First Amendment.

The Sixth Circuit, however, disagreed with *Stern, supra*, in its treatment of allegedly false communications. In *Windsor* v. *The Tennessean*, 719 F.2d 155 (6th Cir. 1983), the plaintiff, a former United States attorney, sued a newspaper, its publisher and two employees for printing defamatory articles about the plaintiff, with knowledge of their falsity or reckless disregard for their truth or falsity. 719 F.2d at 160. The articles were allegedly used to convince plaintiff's superiors to terminate his employment. *Id.* Defendants asserted the immunity accorded the right to petition for redress of grievances. Relying strongly on *White* v. *Nicholls*, 11 L.Ed. 591 (3 How. 266) (1845), in which this Court held that false accusations communicated to a federal employee's superior by perons who knew the communication to be false would not be protected by the right to petition for redress of grievances, the Sixth Circuit held the privilege not applicable. It is important to note that in both *White* and *Windsor* the communications were alleged either to be false *(White)* or made with reckless disregard of their truth or falsity *(Windsor)*.

In contrast to *White* and *Windsor*, the plaintiff here has made no allegation that the allegedly offending communications were false or made with reckless disregard for their truth or falsity. Plaintiff merely claims that defendants will-

fully and maliciously* requested of plaintiff's superiors that he be removed from their plant. (Complaint, paragraph 11.) The facts of the present case thus fit *Stern* exactly, which rationale the Tenth Circuit found applicable. In both cases, citizens aggrieved by a federal officer's performance of his duties complained to his superiors and were successful in having him removed. Each was a "classic exercise" of the right to petition for redress of grievances. 547 F.2d at 1342. Further, to paraphrase *Stern*, plaintiff's Complaint here "makes it plain that the defendants genuinely sought governmental response to their charges" — they requested an employee to be removed and he was removed. 547 F.2d at 1345.

This Court having denied certiorari in *Stern* v. *United States Gypsum, Inc., supra*, there is no reason to grant it now. Moreover, the present case would be a much less appropriate vehicle for defining the outer limits of the privilege accorded petitions for the redress of grievances than was *Stern*, in which plaintiff had alleged that the communications

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* It is important to note that plaintiff has not used the word "malicious" or "maliciously" in the *New York Times Co* v. *Sullivan*, 376 U.S. 254 (1964), sense of "malice" as possessing "knowledge that it was false or with reckless disregard for whether it was false or not." 376 U.S. at 279-280. Rather, it is apparent from even a cursory review of the Complaint that plaintiff uses "malicious" and "maliciously" in the sense of "with ill will" or "with intent to injure". (*See, e.g.*, Complaint, paragraph 12.)

In the law of defamation, however, an injurious motive alone is insufficient to give rise to liability. Rather, plaintiff must allege falsity. *See, e.g., Prosser and Keeton on Torts*, §116 (5th Ed. 1984); Restatement (2d) of Torts, §581A, comment a. To quote from the Restatement (2d) of Torts:

> There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him. (§581A, comment a.)

Certainly no lower standard should apply when First Amendment freedoms are at stake, simply because plaintiff invokes 42 U.S.C. §1985(1). *Cf. New York Times Co.* v. *Sullivan, supra*. Moreover, since the communications at issue are incapable of being either true or false, defendants could not possibly have made them with knowledge of their falsity.

were false. In the present case there is and can be no allegation of falsity. The communications at issue being incapable of truth or falsity, the instant case would be totally inappropriate for exploring the scope of immunity to be afforded false communications.

Further, the communications at issue being insusceptible of falsity, the reference in the instant opinion to the Seventh Circuit's observation that "this kind of redress-seeking" should not be curtailed "under any circumstances" constitutes dictum. *See* 547 F.2d at 1345. With this dictum excised, the instant opinion harmonizes, rather than conflicts, with *Windsor* v. *The Tennessean, supra*. Thus, although the fact pattern of the instant case squarely fits *Stern*, the absence of falsity places this case within the qualified immunity implicitly accepted in *Windsor*, and even the Sixth Circuit would have dismissed the Complaint herein. The instant case does not, therefore, exacerbate the divergence between the Sixth and Seventh Circuits, but rather harmonizes with the Sixth while quoting from the Seventh. It would, therefore, be an equally inappropriate vehicle for exploring the divergence between the Sixth and Seventh Circuits.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were placed in the United States Mail, with proper postage, addressed to Irvin M. Kent, 1430 Havana Street, Aurora, Colorado 80010, Attorney for Petitioner, on the same day this Brief was deposited with Federal Express for delivery to the Clerk of this Court.

_____

Bruce A. Menk

FILED
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No. 84-1747

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

CLEO F. SHOULTZ,

Petitioner,

vs.

MONFORT OF COLORADO, INC.,
a Delaware Corporation;
KENNETH W. MONFORT, AND
SAMUEL D. ADDOMS,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the right to petition for redress of grievances provided in the First Amendment provides absolute immunity to persons who have maliciously communicated false and defamatory statements about a federal meat inspector and participated in a conspiracy to have him removed from his assigned place of duty, prevent him from performing his duties at such place, or to molest, interrupt or hinder him in the discharge of his official duties within the meaning of 42 United States Code Section 1985(1)?

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STATEMENT OF THE CASE

After re-review of the record Petitioner adheres to his Statement of the case.

On July 1, 1985, this Court entered an Order inviting the Solicitor General to file a brief expressing the views of the United States. On Jan. 10, 1986, the Solicitor General filed such a brief and mailed copies thereof to Counsel (hereafter, the Amicus Brief.)

(Errata Note: There is one printing error in Appendix C to the Petition, The Amended Complaint. This is in Para. 19, which appears on page 46. The printed copy shows 42 U.S.C. Section 1985(2), but the Amended Complaint filed with the District Court shows this as 42 U.S.C. Section 1985(1)).

REASONS FOR GRANTING THE WRIT

1. FEDERAL OFFICIALS WHO ARE PROPERLY PERFORMING THEIR DUTIES ARE ENTITLED TO, AND SHOULD HAVE THE PROTECTION AFFORDED THEM BY SEC 1985(1) AGAINST THOSE WHO CONSPIRE TO INTERFERE WITH THE PERFORMANCE OF THOSE DUTIES.

Both the Monfort defendants and the Amicus have misstated the issue, ignored salient facts in the Complaint, and have responded as if only two specific communications by the Monfort defendants to government officials were the basis of this 1985(1) action.

Paragraph 9 through 12 of the Complaint, which are quoted verbatium in Appendix C to Mr. Shoultz' Petition at pages 43-44, list a number of other actions of the Monfort defendants, which were taken in furtherance of the conspiracy whose purpose was to have Mr. Shoultz removed from his assigned place of duty at the Monfort plant, to prevent him from performing his duties at such place, or to molest, interrupt or hinder him in the performance of such duties.

Paragraph 17 of the Complaint quotes from a written communication by Monfort defendant Addoms to Mr. Shoultz's superiors stating that:

> "Plaintiff would be prevented from entering the Monfort plant under any circumstances by security personnel." (Petition, p. 45.)

It is difficult to understand how this assertion of proposed use of force against a Federal official can be deemed worthy of absolute immunity under the Petition Clause of the First Amendment.

Defamation is not the primary issue in this case. Indeed, a major vice of the decision below is that it provided absolute First Amendment immunity for all of the acts alleged in paragraphs 9 through 12 of the Complaint.

Even if the two specific communications were the only acts alleged with any detail, it must be remembered that this Complaint was dismissed prior to any discovery. Under any theory of notice pleading it was sufficient to at least permit discovery. After discovery, the Monfort defendants still have available a possible Summary Judgment remedy under Rule 56, F R Civ P.

The test of "malice" in this connection cannot be merely the truth or falsity of the words spoken. Rather actions or speech to be deemed malicious must be judged in the context of the entire episode. The variety of situations which would justify the use of this term in a civil law context was recently noted by this Court (Smith v. Wade, 461 U S 30, 39, n. 8 (1983).

Nothing contained in any discussion of malice known to counsel, even in the context of a communication, limits its application to a false communication. Truth may be communicated maliciously for an illegal purpose. As this court noted ". . . we discern no reason why a

person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." (Smith v. Wade, supra, at 461 US 48-49).

Acts, such as truthful statements, which are lawful in themselves may lose that character when they become elements of an unlawful scheme (see Continental Ore Co. v. Union Carbide, 370 US 690, 707 (1962)).

Since Mr. Shoultz was a non probationary employee of the federal civil service, statutory provisions guaranteed his employment in the absence of sufficient cause for his discharge (Board of Regents v. Roth, 408 US 564, 576-578(1972). Thus he had a "property interest" in that employment (Arnett v. Kennedy, 416 US 134,155 (1974); 416 US 165-166 (Mr. Justice Powell concurring); 416 US 177-178 (Mr. Justice White concurring and dissenting on other issues).

It is hornbook law that a conspiracy may be established by the use of unlawful means to achieve a lawful result, or of lawful means with intent of achieving an unlawful result. Both are involved here. The first prong was alleged by the allegation of the communication that if Mr. Shoultz was returned to his duties at the Monfort plant he would be physically barred from entry. The second prong was alleged by the allegation of a comunication (lawful in itself) demanding that Mr. Shoultz be removed as an inspector from the Monfort plant. Malice here may be shown by proof that the reason for the request was to prevent proper enforcement of USDA regulations.

Such proof, or lack of its availability, must await the outcome of discovery. It is not a proper basis for dismissal for failure to state a claim upon which relief may be granted.

2. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE OF ABSOLUTE VERSUS QUALIFIED IMMUNITY UPON WHICH THE CIRCUITS AND DISTRICT COURTS HAVE EXPRESSED CONFLICTING VIEWS AND DECISIONS.

In a section 1983 case, the Eighth Circuit found absolute immunity, under the petition for redress of grievances clause of the first Amendment for non-governmental defendants, following Stern v. United States Gypsum, Inc. 547 F2d 1329, 1342-1346 (7th Cir 1977). (Gorman Towers, Inc. v. Bogoslavsky, 626 F2d, 614-615 (8th Cir 1980).

Mr. Shoultz in his petition noted the district court's decision in Smith v. McDonald, 562 F Supp 829 (MD NC 1983) which held the First Amendment to be an absolute bar to plaintiff's 1985 claim, but which also held that a finding of malice would defeat such a defense to a common law libel claim. Only the latter holding was appealed and affirmed. (Smith v. McDonald, 737 F2d 427 (4th Cir 1984)). In so holding the Fourth Circuit relied upon this Court's decision in White v. Nicholls, 44 US (3How) 266 (1845), and Windsor v. The Tennessean, 719 F2d 155 (6th Cir 1983). The latter was a case brought under 1985(1). The Fourth Circuit noted its earlier decision in Bradley v. Computer Sciences Corp., 643 F2d 1029 (4th Cir 1981), cert den 454 US 940 (1981) (which was one of the cases cited below in support of its absolute immunity holding) and said that in Bradley:

> ". . . we held that the petition clause affords a qualified privilege." (At 737 F2d 429).

From its discussion of White v. Nicholls, it seems apparent that had the plaintiff in Smith v. McDonald appealed the ruling against him on his 1985(1) claim, the Fourth Circuit would have held the defendant entitled only to qualified immunity, which could have been defeated by proof of malice (Id). The Fourth Circuit also noted the deccision of the Eight in Gorman Towers v. Bogoslavsky, supra, in support of a claim of absolute privilege and said "We are not persuaded by these authorities." (Id).

This Court has held that in the enactment of the various civil rights statutes, the Congress did not intend to abolish or change the traditional immunities, some of which were absolute, while others

were qualified. (Owen v. City of Independence, Mo., 445 US 622, 638 (1980)). Thus, it must be assumed that the Congress in enacting the statute now known as sec 1985(1) also included only the qualified immunity set forth in White v. Nicholls.

Subsequent to the filing of the instant Petition this Court affirmed the decision of the Fourth Circuit in Smith v. McDonald, supra, in the context of an action for libel. Both the Chief Justice speaking for the majority and Mr. Justice Brennan in concurrence expressed the view that the Petition clause provides only qualified immunity:

> "Nor do the Court's decisions interpreting the Petition Clause in contexts other that defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition. . . . To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble . . . These First Amendment rights are inseparable . . . and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."

Smith v. McDonald, _____ US _____, 54 USLW 4789, 4791 (announced June 19, 1985 in a decision by Mr. Chief Justice Burger). The same thought was expressed by Mr. Justice Brennan, concurring as:

> "There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a let-

> ter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual malice standard set forth in New York Times Co. v. Sullivan, is not shielded by an absolute privilege."

(at 53 USLW 4793).

The Bench and Bar should be given specific direction by this Court, that the Petition Clause provides only qualified rather than absolute immunity for 1985(1) actions. Three recent District Court decisions illustrate the need for such definite guidance, (Giles v. Alley, 591 F. Supp 181, 187 (MD Ala 1985) (qualified immunity); Bodenmiller v. Stanchfield, 557 F Supp 857, 861 (ED NY 1983) (immunity without characterization as absolute or qualified but citing both Stern and Bradley for its position); and Chocallo v. Bureau of Hearings and Appeals, SSA, 548 F Supp 1349, 1360 (ED Pa 1982) (absolute immunity).

The attempt of the Amicus Brief to denigrate the importance of 1985(1) is singularly inappropos. Thousands of low to mid level employees of the United States charged with the enforcement of legislation and protection of the integrity of procurement are faced with the same kinds of pressures here exerted upon Mr. Shoultz by agents of the activities they are required to oversee. If malicious complaints about their performance are to be granted absolute immunity under the Petition Clause it is small wonder that 1985(1) is an all too seldom used statute.

Honest and faithful employees in the federal service deserve its protection in the proper performance of their duty. In each case they would still have to carry the heavy burden of proof of actual malice. When this can be demonstrated, a 1985(1) action should be allowed to go forward as a deterrence against those who would attempt to conspire to hinder or prevent the performance of their duties. If force or threat thereof is a prequisite, it was sufficiently alleged in the Complaint filed herein.

A grant of Certiorari, in a case such as this, involving an important issue of constitutional law need not depend upon whether the plaintiff may ultimately prevail on the merits of his case (e.g., Kush v. Rutledge, 460 US 719, 723, n. 5 (1983)). In Kush Certiorari was granted to settle a split between the circuits on the meaning of 1985(2), but did not touch on the instant question of the nature of the First Amendment immunity vis a vis 1981(1).

CONCLUSION

This issue can and should be laid to rest by this Court. It can be done with great judicial economy by summary disposition, reversing the decision below, with a statement that the doctrine announced in Smith v. McDonald, supra, is equally applicable to actions brought under 1985(1).

The writ should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1985

CLEO F. SHOULTZ, PETITIONER

v.

MONFORT OF COLORADO, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether persons who make nondefamatory communications to the supervisors of a federal official for the purpose of having him removed or transferred from his job may be sued under 42 U.S.C. 1985(1).

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In the Supreme Court of the United States

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MONFORT OF COLORADO, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner is a former meat inspector employed by the United States Department of Agriculture. Before October 4, 1977, he was assigned to inspection duties at a meat processing and packing plant operated by respondent Monfort of Colorado, Inc., in Greeley, Colorado. Petitioner has alleged that Monfort and its officers knowingly and intentionally violated federal regulations, that petitioner sought to enforce those regulations, and that Monfort officers caused petitioners' superiors to transfer him out of the Monfort plant and ultimately to another region. Pet. App. 16, 42-46.

Petitioner brought suit in the United States District Court for the District of Colorado against Monfort of Colorado, Inc., two Monfort officers (Kenneth W. Monfort, the chairman of the board of directors, and Samuel D. Addoms, the president), and four officials of the Department of Agriculture. Petitioner's amended complaint asserted three causes of action. In the first cause of action, petitioner alleged (Pet. App. 46-47) that the nonfederal defendants had conspired against him in violation of 42 U.S.C. 1985(2). (Petitioner appears to have meant 42 U.S.C. 1985(1).) Specifically, petitioner alleged that (Pet. App. 43):

> the Defendant Addoms mailed a letter to Plaintiff's area supervisor demanding Plaintiff's immediate removal as an inspector. Defendant Kenneth W. Monfort telephoned Plaintiff's supervisors in Washington, D.C., demanding the Plaintiff be removed from the Defendant's meat processing packaging plant in Greeley, Colorado, and be reassigned to a different location neither owned nor operated by Defendant and both of said individual Defendants and other agents and servants of the Defendant company did continue in their efforts to cause the removal and reassignment of plaintiff to other states far removed from his domicile; and as a consequence of said malicious acts, Plaintiff was detailed on or about October 4, 1977, to another Federally-inspected facility in Denver, neither owned or operated by Defendant.

Petitioner also alleged, as part of his first cause of action, that the federal defendants violated 42 U.S.C. 1986 because "having knowledge that the said wrongs conspired to be done, were about to be committed, and having power to prevent or aid in preventing the commission of the same, [they] neglected and refused to do so" (Pet. App. 46-47). In addition, petitioner's first cause of action made references

(*id.* at 46) to the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, although it is unclear whether he intended to assert a claim under that Act.

Petitioner asserted two additional causes of action, neither of which is relevant for present purposes. In the second cause of action (Pet. App. 47-49), petitioner alleged that the defendants had conspired, in violation of 42 U.S.C. 1985(2), to prevent him from suing for an injury he suffered in an accident at the Monfort plant. In his final cause of action (Pet. App. 49-50), petitioner alleged that the federal defendants violated his Fifth Amendment rights, "in particular * * * the right to initiate and prosecute a civil action for damages" (*id.* at 50). For these alleged violations, petitioner sought $250,000 in actual damages and $250,000 in exemplary damages. *Ibid.*

2. The district court dismissed all of petitioner's claims (Pet. App. 30-38). In dismissing petitioner's claim that the nonfederal defendants conspired to have him removed from his job or transferred, the court relied (Pet. App. 33) on *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), cert. denied, 434 U.S. 975 (1977), which held (547 F.2d at 1342-1346) that 42 U.S.C. 1985(1) did not permit a suit by an IRS agent who claimed that he suffered adverse personnel action and damage to his reputation due to defamatory complaints made to his supervisors by the officers of a company he was auditing. The *Stern* court examined (547 F.2d at 1334-1336) the legislative history of Section 1985(1), which originated as part of Section 2 of the Ku Klux Act, ch. 22, 17 Stat. 13. The court noted that Congress's concern was the use of physical force and intimidation against federal officials (547 F.2d at 1334-1335). Indeed, the court observed (*id.* at 1335):

> It would * * * surprise us if any member of that Congress ever specifically contemplated the application of

> the provisions which became § 1985(1) to a conspiracy to defame and discredit [a federal official] to his superiors.

The *Stern* court nevertheless refused to confine Section 1985(1) to the abuses that motivated its enactment (547 F.2d at 1335), and the court rejected several limiting arguments advanced by the defendants (*id.* at 1336-1342). However, the court concluded (*id.* at 1342-1343) that Petition Clause (Amend. I) problems would be created if Section 1985(1) were interpreted as reaching the conduct in question, and the court refused (547 F.2d at 1344) to adopt this construction in the absence of evidence that Congress specifically so intended.

The district court rejected any claim under the Federal Meat Inspection Act, finding "no intent on the part of Congress to imply a tort remedy" (Pet. App. 31). The court also rejected petitioner's constitutional tort claims against his supervisors because (*ibid.*):

> Federal employees have rights and rights and rights and rights and rights and rights that most people don't have, and to say they can just sue their bosses instead of following the statutory scheme that has been created for federal employees * * * is something I just cannot go along with.

3. The court of appeals affirmed (Pet. App. 14-29). With respect to petitioner's claim under Section 1985(1), the court of appeals agreed with the Seventh Circuit's decision in *Stern* (Pet. App. 19). With respect to petitioner's claim under Section 1985(2) that the defendants conspired to prevent him from suing for an injury suffered in an accident, the court of appeals noted (Pet. App. 20) that Section 1985(2) applies only to interference with the right to sue in federal court and that petitioner did not allege diversity of citizenship with Monfort of Colorado, Inc. Finally, the

court of appeals held (Pet. App. 21-25) that there is no implied private right of action available to meat inspectors under the Federal Meat Inspection Act and that petitioner's constitutional tort claims against his supervisors based on personnel actions were barred by *Bush* v. *Lucas*, 462 U.S. 367 (1983).

DISCUSSION

The only question raised in the petition is whether petitioner's claim under 42 U.S.C. 1985(1) was properly dismissed in reliance on the Petition Clause and the Seventh Circuit's decision in *Stern*. In light of *McDonald* v. *Smith*, No. 84-476 (June 19, 1985), we think that some of the reasoning of *Stern* is no longer sound. Nevertheless, we believe that the decision below is correct. Moreover, that decision does not conflict with *McDonald*, with any other decision of this Court, or with the decision of any other court of appeals. Accordingly, review by this Court is not warranted.

1. The thrust of petitioner's Section 1985(1) claim is that the nonfederal defendants (respondents) demanded his removal or transfer because he was properly performing his duties. The petition (at 3) summarizes this claim as follows:

> The Monfort defendants in response and in retaliation to Mr. Shoultz' attempts to strictly enforce USDA rules and regulations, embarked on a program to harrass, persecute, and otherwise interfere with his activities as a federal meat inspector, and knowingly and maliciously sought to cause the USDA to discharge him from his employment or remove him from their plant. Specifically, Mr. Monfort telephoned Mr. Shoultz' superiors in Washington, D.C., demanding that he be removed from the Greeley plant and be reassigned to inspect another plant owned by another

company. Mr. Addoms wrote a letter to Mr. Shoultz' more immediate supervisors in Colorado in an effort to get him out of the plant, as a result of which D. W. Anderson, the USDA Area Supervisor for MPI in Colorado (R. 18), and the other federal officials detailed Mr. Shoultz on October 4, 1977, to another USDA-inspected facility in Denver (Tr. 21).

It should be noted that neither the complaint (see Pet. App. 43) nor the petition alleges that respondents communicated slanderous or libelous information about petitioner to his superiors—or indeed that they communicated any information at all. What is alleged is that they telephoned and wrote demanding his discharge or transfer. This alleged conduct is not actionable under 42 U.S.C. 1985(1).

Section 1985(1) creates a cause of action for damages against persons who engage in four separate types of conspiracies. These are conspiracies:

> [1] to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof;
>
> [2] or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed[;]
>
> [3] or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof[;]
>
> [4] or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties[.]

Petitioner's complaint appears to allege that the first three of these provisions were all violated (see Pet. App. 46-47). However, the first two portions of Section 1985(1) expressly require "force, intimidation, or threat," and petitioner has not alleged that respondents attempted to procure his dismissal or transfer by these means. See Pet. App. 43; Pet. 3. According to petitioner (Pet. 3), respondents merely "sought to cause" and "demand[ed]" his dismissal or transfer.

Nor do we believe that petitioner has stated a claim under the third portion of Section 1985(1). A strong argument can be made that this provision, like the first two portions of Section 1985(1), requires "force, intimidation, or threat." In *Stern,* the Seventh Circuit rejected this argument based solely on the syntax of the modern statutory provision (see 547 F.2d at 1336-1337). But in its original form, as part of Section 2 of the Ku Klux Act, this provision may well have required "force, intimidation, or threat,"[1] and the subsequent codification of this provision "was not intended to change the substantive meaning of the 1871 Act." *Kush* v. *Rutledge,* 460 U.S. 719, 724 (1983) (footnote omitted). Furthermore, as the *Stern* court recognized, the legislative history shows that Congress's concern centered on such violent actions.

Even if the portion of Section 1985(1) at issue here does not require force, intimidation, or threat, petitioner's complaint still failed to state a claim.[2] As *McDonald* shows,

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[1]Section 2 of the Ku Klux Act is reprinted as an appendix to this brief. See pages 1a-3a, *infra.*

[2]At the very least, the term "injure" in this portion of Section 1985(1) should be construed to require wrongful action. The primary definition of "injure" in *Black's Law Dictionary* 706 (5th ed. 1979) is "[t]o violate the legal right of another or inflict an actionable wrong." This limitation is also necessary to prevent Section 1985(1) from reaching lawful conduct that Congress could not have meant to proscribe. For example, if

Stern was wrong in suggesting that persons who make defamatory communications to public officials are absolutely immune under the Petition Clause from suits for libel or slander. But *McDonald* did not question that the Petition Clause may preclude suits based on communications that are not defamatory. Indeed, this Court, in construing federal statutes, has eschewed interpretations that "would raise important constitutional questions" under the Petition Clause. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). See also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-671 (1965); but see *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). In the present case, the provision of Section 1985(1) in question should not be construed to reach nondefamatory Petition Clause activity, absent clear support for such a construction in either the language of the statute or the legislative history.

2. The decision in this case does not conflict with *McDonald*. In *McDonald*, a disappointed candidate for the position of United States Attorney brought a libel action in state court against the author of disparaging letters sent to the President and other federal officials. After removal of the case to federal court, the defendant moved for judgment on the pleadings, claiming that the Petition Clause provided absolute immunity. The lower courts rejected this argument, and this Court unanimously affirmed, holding that the Petition Clause does not provide absolute immunity for

---

a group placed a newspaper advertisement publicizing derogatory but *truthful* information about a federal officer because of the group's displeasure with his lawful discharge of his office, their conduct might well fall within Section 1985(1) if the term "injure" is not restricted to wrongful conduct. But such a suit obviously would raise serious First Amendment problems. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

individuals who express libelous falsehoods in letters to government officials.

McDonald is distinguishable from the present case on at least two grounds. First, *McDonald* involved allegedly defamatory statements. Second, *McDonald* involved a claim of constitutional immunity from suit, not the construction of Section 1985(1).[3] (Petitioner does not appear to appreciate this distinction. His "Question Presented" erroneously describes this case as involving an immunity question. See Pet. i.) Even if the Petition Clause would allow a broader interpretation of Section 1985(1) than the one we believe is correct, that does not mean that Congress intended the statute to carry that broader meaning.

3. Contrary to petitioner's contention (Pet. 10-11), the decision in this case also does not conflict with *Windsor* v. *The Tennessean*, 719 F.2d 155 (6th Cir. 1983), cert. denied, No. 83-1920 (Oct. 1, 1984), or *Mayer* v. *Wedgewood Neighborhood Coalition*, 707 F.2d 1020, 1023 (9th Cir. 1983). *Windsor* involved claims for printing defamatory material "knowing the information to be false or with reckless disregard of its truth or falsity" (719 F.2d at 160). Moreover, although Judge Contie's lead opinion concluded that these allegations stated claims under Section 1985(1) (719 F.2d at 160-162), it upheld their dismissal on other grounds (*id.* at 162-165). Thus, the opinion's discussion of Section 1985(1) was dictum. Indeed, no other member of

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[3]Petitioner states that *McDonald* also involved a Section 1985(1) claim, citing the district court's decision in *McDonald* as holding that "the First Amendment privilege was an absolute barrier to plaintiff's claim under 42 U.S.C. 1985" (Pet. 7). The reported opinions in *McDonald*, however, give no indication that the plaintiff there (who only was a prospective government officer) had presented a Section 1985(1) claim (see *Smith* v. *McDonald*, 562 F. Supp. 829 (M.D.N.C. 1983), aff'd, 737 F.2d 427 (4th Cir. 1984), aff'd, No. 84-476 (June 19, 1985)).

the panel agreed with Judge Contie's First Amendment analysis.[4]

Mayer v. *Wedgewood Neighborhood Coalition, supra,* is further afield. There, a complaint under 42 U.S.C. 1985(3) was dismissed for lack of standing, and the defendants were awarded attorney's fees. On appeal, only the issue of attorney's fees was raised, and the court of appeals reversed. The court of appeals held that the complaint, which "alleged defendants tortiously interfered" (707 F.2d at 1022) with the construction of a lower-income housing project, was not frivolous or vexatious and that the award of attorney's fees was therefore unjustified. Since *Mayer* (a) involved a different statute, (b) involved allegations of tortious conduct, and (c) was concerned solely with the award of attorney's fees, it has no bearing here.

4. Finally, all else aside, we cannot conclude that the issue presented in this case is of sufficient importance to warrant further review. Section 1985(1) is a little-used statute. In addition, federal officers like petitioner who are aggrieved by adverse personnel actions have ample means of administrative and judicial redress. Recognition of a cause of action under Section 1985(1) in the circumstances of this case is not needed to protect their interests. See *Bush* v. *Lucas,* 462 U.S. 367 (1983); *Lawrence* v. *Acree,* 665 F.2d 1319, 1328 (D.C. Cir. 1981) (Wald, J., concurring); Pet. App. 25, 32.

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[4]Judge Edwards joined Judge Contie's opinion but expressly noted that he "would accept the First Amendment reasoning of the majority in *Stern*" (719 F.2d at 166). Judge Moynahan merely concurred in the result, believing that the suit was barred by absolute immunity (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1986

APPENDIX

Section 2 of the Ku Klux Act, ch. 22, 17 Stat. 13 provided (emphasis added):

> That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or *by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty,* or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the

United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a

period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."